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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth Supreme Judicial District

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Kenneth R. Pinckard, respectfully requests that this Court deny the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The judgment sought to be reviewed is not final.

The Petitioners seek review of one sentence of a five page INTERLOCUTORY injunction signed approximately eighteen months ago. The interlocutory injunction sought to be reviewed by the Petitioners arose from their motion to dissolve a prior temporary injunction. This Court has on numerous occasions held that the denial

of a motion to dissolve a temporary injunction, or the affirmance or reversal of an order granting or denying an interlocutory or temporary injunction is not final when the entire case is not thereby concluded, and is, therefore, not reviewable by this Court. *Montgomery Building and Construction Trade's Counsel v. Ledbetter Erection Co., Inc.,* 344 U.S. 178 (1952); *Musser v. Sheppard,* 299 U.S. 513; *Williams v. Quill,* 303 U.S. 621; *Twin City Power Company v. Savannah River Electric Co.,* 284 U.S. 574. While the Court has occasionally departed from its normal practice of denying interlocutory review, this case does not fit within the criteria apparently justifying such a departure from the normal practice. For instance, in *Construction Laborers v. Curry,* 371 U.S. 542 (1963) the judgment of the Supreme Court of Georgia finally resolved the merits of the issues raised in the course of the hearing on the temporary injunction and left nothing of substance to be decided in the trial court. Postponing review would have seriously eroded the national labor policy requiring the subject matter of the cause to be heard exclusively by the National Labor Relations Board, not by state courts. In the present case, the Texas Supreme Court dismissed the application for writ of error for want of jurisdiction, and no national policy is affected by postponing review in this case until there is a final judgment.

2. The state courts did not expressly pass on the federal questions raised by the Petitioners.

The Texas Supreme Court dismissed the Petitioners' application for writ of error for want of jurisdiction. The intermediate appellate court, the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, in a

three paragraph unpublished opinion affirmed the temporary injunction on non-federal grounds because no abuse of discretion had been shown. (Exhibit "A" to Petition) No opinion was published by the Court of Appeals or the Texas Supreme Court. No precedent has been established in this case, and there is no reason to believe that the issues raised by this case will occur again.

3. The petition for writ of certiorari is not timely.

The time from which the ninety days is calculated is the day of entry of the judgment which the Court is requested to review. The order or judgment of the highest state court is controlling as to the running of the time. By "highest state court" is meant the highest court in which a decision could be had. *American Railway Express Co. v. Levee,* 263 U.S. 19. In the present case, the Petitioners have computed the time for filing their petition from October 27, 1982, the date the Supreme Court of Texas overruled their motion for rehearing. But the Texas Supreme Court denied their application for writ of error for want of jurisdiction. The "highest state court" in which a decision could be had was the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. The Court of Appeals filed its opinion on March 25, 1982, and overruled Petitioners' motion for rehearing on April 22, 1982, substantially more than ninety days prior to the filing of the Petition.

4. Petitioners have waived any right to challenge the subject portion of the interlocutory injunction.

The Petitioners complain about one sentence of a five page order modifying and continuing a temporary in-

junction. This order arose from the Petitioners' application for dissolution of a prior temporary injunction. The prior temporary injunction provided:

> "Defendants (Petitioners) shall not divulge any information or copies relating to Plaintiff (Respondent) except to the parties and the attorneys in this suit or to the Court."

The Petitioners did not appeal from such original temporary injunction provision and their application for dissolution of the original temporary injunction did not seek dissolution of the foregoing quoted portion.

In summary, the original temporary injunction from which no appeal was perfected also contained a provision prohibiting the Petitioners from divulging any information or copies relating to the Respondent. The Petitioners did not appeal from this prohibition and they did not seek to dissolve it in the trial court. They have waived any right to complain about the continuation of such provision in the order modifying and continuing the temporary injunction. See *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Johnson v. Zerbst,* 304 U.S. 458 (1938).

5. The pleadings, evidence and law support the subject order.

After learning that Wayne Pinckard, one of the Petitioners, had employed private investigators to investigate him and his new corporation, Kenneth Pinckard, the Respondent, filed his first supplemental application for temporary injunction seeking to enjoin such conduct as unfair competition, an invasion of privacy and harassment. (Transcript 170). The trial court granted Re-

spondent's application in part and temporarily enjoined both sides of the case from conducting surveillance of any other party, or their friends or relatives; and further temporarily enjoined all parties from examining, appropriating, and acquiring any document or material discarded by any other party. The trial court also temporarily enjoined the Petitioners from divulging any information regarding the personal deportment of the Respondent to anyone except his parents. (Transcript 177, 1978).

Wayne Pinckard, one of the Petitioners testified that he considered himself to be in competition with the Respondent and his corporation, Pinckard Development Corporation (S.F. 313-316). The evidence is also clear that Wayne Pinckard employed private investigators to investigate both his brother, the Respondent, and his brother's corporation, Pinckard Development Corporation (S.F. 44-98, 106-110). Instructions were given to such investigators to search the trash of Pinckard Development Corporation. Such investigators were also told to go to the home of Linda Appelbaum, who was represented to such investigators as the Respondent's girlfriend (S.F. 123-129). The testimony reveals that the investigators did in fact go to Linda Appelbaum's home (S.F. 44-98, 106-110).

Surveillance of Respondent's friends or family, and discussion of his personal deportment, have nothing to do with this case. Such surveillance or discussion is nothing more than harassment by the Petitioners in an effort to force a settlement. The trial court did not abuse its discretion by temporarily enjoining such conduct; and the Court of Appeals did not err in affirming such order. In a proper case, a trial court may temporarily restrain

out-of-court statements in order to preserve a fair trial. See *In re: Halkin*, 598 F.2d 176 (D.C. Cir. 1979) and cases cited therein.

CONCLUSION

For these reasons, the petition for writ of certiorari should be dismissed; or, alternatively, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael T. Powell, hereby certify that, on the 12th day of April, 1983, the Respondent's Brief in Opposition was served on Edmund L. Cogburn of Dow, Cogburn & Friedman, attorney of record for Petitioners at 2300 Coastal Tower, Nine Greenway Plaza, Houston, Texas 77046, by mailing it to him, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, postage prepaid.

MICHAEL T. POWELL